No. 93-445

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

LENARD RAY BEECHAM

and

KIRBY LEE JONES,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

NATHAN LEWIN
(Counsel of Record)
MILLER, CASSIDY,
LARROCA & LEWIN
2555 M Street, N.W.
Washington, D.C. 20037
(202) 293-6400

Attorney for Lenard Ray Beecham

R. RUSSELL STOBBS
P.O. Box 1167
Weston, West Virginia 26452
(304) 269-5383

Attorney for Kirby Lee Jones

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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QUESTION PRESENTED

Whether a person with a federal felony conviction who has had his civil rights restored under state law is deemed a felon for purposes of 18 U.S.C. § 922(g)(1), which makes it a federal offense for a convicted felon to possess a firearm.

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Petition for a Writ of Certiorari

OPINIONS BELOW

The decision of the court of appeals in *United States v. Beecham* (App. A, pp. 1a-9a, *infra*) is not reported. The decision of the court of appeals in *United States v. Jones* (App. B, pp.10a-22a, *infra*) is reported at 993 F.2d 1131.

JURISDICTION

The decision of the court of appeals in the *Beecham* case was rendered on June 2, 1993. A timely petition for rehearing and suggestion for rehearing in banc was denied on June 29, 1993 (App. C, p. 23a, *infra*). The decision of the court of appeals in the *Jones* case was rendered on May 24, 1993. On August 13, 1993, Chief Justice Rehnquist extended the time within which to file a petition for a writ of certiorari in the *Jones* case to and including September 21, 1993 (App. D, p. 24a, *infra*). This petition is being filed with respect to both the *Beecham* and *Jones* decisions under Rule 12.2 of the Rules of this Court that provides:

> When two or more cases are sought to be reviewed on a writ of certiorari to the same court and involve identical or closely related questions, a single petition for a writ of certiorari covering all the cases will suffice.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

STATUTES INVOLVED

Section 922(g) of Title 18 provides as follows:

> (g) It shall be unlawful for any person —

> (1) who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year;
>
> (2) who is a fugitive from justice;
>
> (3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));
>
> (4) who has been adjudicated as a mental defective or has been committed to a mental institution;
>
> (5) who, being an alien, is illegally or unlawfully in the United States;
>
> (6) who has been discharged from the Armed Forces under dishonorable conditions; or
>
> (7) who, having been a citizen of the United States, has renounced his citizenship;
>
> to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

Section 921(a)(20) of Title 18 provides as follows:

> (20) The term "crime punishable by imprisonment for a term exceeding one year" does not include —

(A) any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses, relating to the regulation of business practices, or

(B) any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.

What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

STATEMENT

Introduction

This petition brings before this Court an issue of federal law that the Court of Appeals for the Fourth Circuit has decided in conflict with the Eighth and Ninth Circuits. The Fourth Circuit decided the issue in two criminal appeals that recently came before it. Pursuant to Rule 12.2 of the Rules of this Court, one issue of law is being presented, on behalf of both petitioners, in a single Petition for a Writ of Certiorari. We set out below the relevant facts of the two criminal cases.

The *Beecham* Case

In January 1979, petitioner Beecham was convicted in the United States District Court for the Western District of Tennessee of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g). Tennessee law provides for the automatic restoration of rights of certain convicted felons under Tenn. Code Ann. §§ 40-29-105(b)(1)(B) and (C).

In 1990, petitioner was owner and operator of a used car dealership in Raleigh, North Carolina. Between November 1990 and March 1991, petitioner purchased and sold a semi-automatic pistol. He also purchased another pistol and a shotgun, and sold a shotgun to his former partner in the car dealership and a revolver to an employee of the Bureau of Alcohol, Tobacco and Firearms ("ATF") who was posing as a car purchaser. Search warrants executed in petitioner's home and place of business in March 1991 produced other evidence of his ownership of firearms.

Petitioner completed an ATF form when he purchased a shotgun from a licensed dealer in December 1990. In answer to the question whether he had been convicted of a felony, petitioner replied, "No."

Petitioner was charged in an 11-count indictment in the Eastern District of North Carolina with five counts of possessing a firearm following a felony conviction in violation of 18 U.S.C. § 922(g)(1), with five counts of dealing in firearms without a license in violation of 18 U.S.C. § 922(a)(1)(A), and with one count of making a false statement in connection with the purchase of a firearm in violation of 18 U.S.C. § 922(a)(6). Following a trial by jury, he was convicted on all counts.

After return of the jury's verdict, the trial judge granted petitioner's motion for a judgment of acquittal on the felon-in-possession and false-statement counts on the ground that the effect of Tennessee's restoration-of-rights statute was to extinguish petitioner's prior federal conviction for purposes of the federal firearms statute.

The government appealed from the entry of the judgment of acquittal. The Court of Appeals for the Fourth Circuit reversed on the basis of its decision in *United States v. Jones*.

The *Jones* Case

Petitioner Jones was convicted in the courts of West Virginia in 1969 and in 1978 of breaking and entering and of forgery. He was also convicted in 1971 in the United States District Court for the Southern District of Ohio of interstate transportation of a stolen automobile. In 1982, on being discharged from a West Virginia prison, he received a certificate that declared, pursuant to West Virginia law, that his civil rights were restored.

Petitioner was indicted in the Northern District of West Virginia in March 1992 on a two-count indictment charging him with violations of 18 U.S.C. § 922(g)(1) (felon-in-possession) and § 922 (a)(6) (false-statement). This prosecution was based on petitioner's federal felony conviction in 1971 which, in the government's view, made him a convicted felon in 1992 for purposes of the federal firearms laws. Petitioner moved to dismiss the indictment on the ground that the restoration of rights granted by West Virginia law effectively expunged his federal conviction under 18 U.S.C. § 921(a)(20).

The district court accepted a magistrate judge's recommendation (App. E, pp. 25a-30a, *infra*) that the indictment be dismissed. The magistrate judge relied on decisions of the Eighth and Ninth Circuits that had held that a state's restoration of civil rights to a felon convicted of a federal felony vitiates the federal conviction under 18 U.S.C. § 921(a)(20).

On appeal, the Fourth Circuit reversed. The court acknowledged that the Eighth and Ninth Circuits had squarely held in *United States v. Edwards*, 946 F.2d 1347 (8th Cir. 1991), and *United States v. Geyler*, 932 F.2d 1330 (9th Cir. 1991), that a state's restoration of civil rights negates a prior federal conviction under 18 U.S.C. § 921(a)(20) and thereby precludes a charge under 18 U.S.C. § 922(g)(1). The court observed that a "circuit-split . . . will be created by our judgment" (p. 14a, *infra*).

The Fourth Circuit disagreed with the Eighth and Ninth Circuits on the "plain meaning" of Section 921(a)(20). The court below held that the term "restoration of civil rights" is subject to several legitimate interpretations, and that the legislative history justifies the conclusion "that Congress intended for a state's post-conviction restoration scheme to affect only the rights of persons convicted in that state's courts" (pp. 21a-22a, *infra*).

REASONS FOR GRANTING THE WRIT

1. **There is now a square inter-circuit conflict.** — The court of appeals recognized in its *Jones* opinion that its decision created a "circuit-split" (p. 14a, *infra*). The Eighth and Ninth Circuits have held in *United States v. Edwards*, 946 F.2d 1347 (8th Cir. 1991), and *United States*

v. Geyler, 932 F.2d 1330 (9th Cir. 1991), that a person who is convicted of a federal felony and thereafter has his civil rights restored by operation of state law is not deemed to be a "person convicted in any court of a crime punishable by imprisonment for a term exceeding one year" for purposes of prosecution under 18 U.S.C. § 922(g).

The Ninth Circuit's *Geyler* decision noted that the governing statute refers specifically to the "restoration of civil rights" as a reason for nullifying a conviction for purposes of the federal firearms statute. Congress must have anticipated, therefore, that this relief, which is *only* available under state law and is not available under federal law, would be a valid basis for disregarding *any* prior conviction of a person who is found to possess or own a firearm. And in view of the broad, all-encompassing language of Section 921(a)(20) — which applies to *any* conviction that satisfies the definition of a "crime punishable by imprisonment for a term exceeding one year" — Congress intended that federal felony convictions, as well as state convictions, would be nullified if the felon had his rights restored under state law. 932 F.2d at 1333.

The Eighth Circuit agreed with the Ninth Circuit in its *Edwards* decision, and also rejected the argument that 18 U.S.C. § 925(c), a provision authorizing special applications to the Secretary of the Treasury for relief from the statutory disabilities, is the exclusive means by which a federal felon may regain the right to possess a firearm. 946 F.2d at 1350.

In its decisions in *Beecham* and *Jones* the Fourth Circuit has disagreed with the rationale and conclusion of both federal appellate courts. Based on its view of the purpose of the federal firearms laws — "to keep guns out of the wrong hands" (p. 20a, *infra*) — the Fourth Circuit has

ignored the plain language of the federal statute and has held that a state's restoration of rights affects only the continued vitality of a felony conviction in its own courts, but not the consequences of the federal conviction under the federal firearms laws. This conflict warrants authoritative resolution by this Court. [1]

2. <u>The conflict creates great uncertainty</u>. — This is not a conflict that affects only court procedures or other issues that have little effect on the primary conduct of ordinary citizens. As a result of the conflicting decisions of the courts of appeals, ordinary citizens who wish to be law-abiding do not know how to conform their conduct to the requirements of the law.

May an individual who was convicted of a federal felony (other than those specifically enumerated in 18 U.S.C. § 920 (a)(20)(A)), and whose civil rights have been restored by state law purchase a firearm? If he lives in Alaska, Arizona, Arkansas, California, Hawaii, Idaho, Iowa, Minnesota, Missouri, Montana, Nebraska, Nevada, North Dakota, Oregon, South Dakota, or Washington, he may purchase a firearm from a registered dealer on completing the standard registration. If he lives in Maryland, North Carolina, South Carolina, Virginia, or West Virginia, he may not. And if he lives in any of the other 29 States of the Union, he purchases a firearm at his own risk. That geographical distinction was surely not contemplated by Congress.

---

[1] As the magistrate judge noted in his *Jones* decision, the Sixth Circuit expressed its agreement with *Geyler* and *Edwards* in its decision in *United States v. Kaplan*, 972 F.2d 349 (6th Cir. 1992) (unpublished opinion). A copy of the Sixth Circuit's *Kaplan* opinion appears as Appendix F, pp. 31a-52a, *infra*.

Indeed, it is a fair inference from the record that petitioner Beecham believed that the restoration of rights he had received from Tennessee nullified his federal conviction for firearms purposes. His purchase and sale of various firearms was so open that it is not reconcilable with any consciousness that he was committing a federal offense.

Moreover, until this conflict is resolved by an authoritative ruling from this Court, its existence creates uncertainty even for individuals residing in any of the three Circuits where the issue has already been resolved. If a resident of Oregon with a federal felony conviction who lawfully purchases a firearm under the *Geyler* decision carries his weapon across the country to Virginia and is found in that state, may he be successfully prosecuted in a federal court in Richmond? So long as the conflict continues, that possibility exists.

3. **The decision conflicts with the principle of lenity and with the plain language of the statute.** — The Fourth Circuit's decision is also erroneous because it conflicts with the "rule of lenity" that this Court has repeatedly applied in the construction of criminal statutes. In *United States v. Bass*, 404 U.S. 336, 348 (1971), the Court said that "where there is ambiguity in a criminal statute, doubts are to be resolved in favor of the defendant." *See also Liparota v. United States*, 471 U.S. 419, 427 (1985). Applying this principle in *Crandon v. United States*, 494 U.S. 152, 158 (1990), this Court said that the rule of lenity "serves to ensure both that there is fair warning of the boundaries of criminal conduct and that legislatures, not courts, define criminal liability."

The plain language of the statute relieves the petitioners of criminal liability because their civil rights were restored by operation of local law before the date on which they owned or possessed the firearms. But even if the applicable statute is ambiguous, the "rule of lenity" bars their prosecution or conviction.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

NATHAN LEWIN
(Counsel of Record)
MILLER, CASSIDY,
LARROCA & LEWIN
2555 M Street, N.W.
Washington, D. C. 20037
(202) 293-6400

Attorney for Lenard Ray Beecham

R. RUSSELL STOBBS
P. O. Box 1167
Weston, West Virginia 26452
(304) 269-5383

Attorney for Kirby Lee Jones

September 1993

APPENDIX

APPENDIX A

Unpublished

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellant,* v. LENARD RAY BEECHAM, *Defendant-Appellee.*	)	No. 92-5147

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. LENARD RAY BEECHAM, *Defendant-Appellant.*	)	No. 92-5399

Appeals from the United States District Court
for the Eastern District of North Carolina, at Raleigh.
W. Earl Britt, District Judge;
Franklin T. Dupree, Jr., Senior District Judge.
(CR-91-84-5)

Argued: March 4, 1993
Decided: June 2, 1993

Before HALL, Circuit Judge,
BUTZNER, Senior Circuit Judge, and
POTTER, United States District Judge for the
Western District of North Carolina, sitting by designation.

Affirmed in part, reversed in part, and remanded by unpublished per curiam opinion.

COUNSEL

ARGUED: John Fichter De Pue, Terrorism & Violent Crime Section, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellant. Thomas Peter McNamara, HAFER, MCNAMARA, CALDWELL & CARRAWAY, P.A., Raleigh, North Carolina, for Appellee. **ON BRIEF:** Margaret Person Currin, United States Attorney, Raleigh, North Carolina, for Appellant.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

The United States appeals an order granting judgment of acquittal on five counts charging Lenard Ray Beecham with being an ex-felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1), and one count of making a false

statement in connection with the purchase of a firearm, in violation of 18 U.S.C. § 922(a)(6) (No. 92-5147). Beecham cross-appeals his conviction on five counts of dealing in firearms without a license, in violation of 18 U.S.C. § 922(a)(1)(A) (No. 92-5399). We reverse the judgment of acquittal, affirm the judgment of conviction, and remand for further proceedings.

I

Beecham was convicted of a felony in 1979 in the federal court for the Western District of Tennessee. After his release from prison, he and Anthony Lucas opened Eagle Auto Sales, a used car dealership, in Raleigh, North Carolina. The focus of the evidence at trial was on firearms sales by Beecham on the premises of the dealership during late 1990 and early 1991.

While working at the dealership in November, 1990, Beecham bought a 9mm. semi-automatic pistol for $375 which he later sold to Lucas for $450. About this same time, he also sold a shotgun to Lucas for $300.

On December 22, 1990, Beecham purchased a .410 gauge shotgun from a licensed firearms dealer. On the required Bureau of Alcohol, Tobacco and Firearms (ATF) form, Beecham answered "no" to the question asking whether he had ever been convicted of a felony in any court.

On February 2, 1991, Clarence Jones, a customer at the dealership, told a salesman that he did not have the full price of a certain automobile on the lot, but that he did have a .44 magnum pistol that he was going to sell soon. The salesman said he knew someone who would be interested in the gun and went to speak with Beecham. When the

salesman returned, he offered to include the gun in the down payment for the car. The car deal was not consummated, but the gun was sold for $350. Although the entire transaction took place between Jones and the salesman, Jones signed a written agreement indicating that Beecham was the purchaser.

A few weeks later, ATF agent McAleer posed as a customer at the car dealership and told a salesman that he was interested in obtaining a .44 caliber revolver. The salesman replied: "I think he's still got a .44 that he still wants to sell." Beecham introduced himself to McAleer and they discussed the revolver. During the discussion, Beecham noted that he did a lot of gun business. McAleer bought the gun for $500.

On March 14, 1991, search warrants were executed at the dealership and at Beecham's home. A .45 caliber semi-automatic pistol was found in a zippered case in an employee's car on the lot, and a search of the office turned up a bill of sale evidencing the purchase of this pistol by Beecham in January, 1991. The search of Beecham's home revealed five firearms, including one that had been purchased by Beecham's wife.

Lucas testified that Beecham often traded guns and that he had seen Beecham involved in "maybe five" transactions in which cash was exchanged. Donnie Barbour, formerly a licensed gun dealer, testified that Beecham had showed him "quite a few" firearms and had asked about their value. Barbour also stated that Beecham said he sold guns for more than they were worth.

Beecham was found guilty by a jury of five counts of being an ex-felon in possession of a firearm, one count of making a false statement in connection with the purchase of

a firearm, and five counts of dealing in firearms without a license. An element of the felon-in-possession and false-statement crimes is that the defendant have a prior felony conviction, and the district court held that the State of Tennessee's restoration of Beecham's civil rights after the completion of his 1979 federal sentence nullified that conviction insofar as these charges were concerned. Accordingly, the district court granted Beecham's motion for judgment of acquittal on the felon-in-possession and false-statement counts, and the government appeals this ruling. Beecham's cross-appeal is grounded on his contention that he was not a "dealer" who was required to obtain a license under the statute of conviction.

II

The issue raised in the government's appeal has been recently decided by this court in *United States v. Jones*, 92-5820 (4th Cir. May 24, 1993). In *Jones*, we held that a state's restoration-of-rights scheme does not nullify a prior federal conviction under the definition of predicate conviction in 18 U.S.C. § 921(a)(20). Beecham's 1979 conviction in federal court remains unaffected by Tennessee's, North Carolina's, or any other state's restoration-of-rights scheme for the purposes of these federal firearms statutes. Accordingly, we reverse the ruling of the district court dismissing the § 922(g)(1) and § 922(a)(6) convictions.

III

In his cross-appeal, Beecham argues that the evidence was insufficient to support his convictions on the five counts of violating § 922 (a)(1)(A) because his firearm-related activities did not rise to the level of a "business." [1]

The statute of conviction, 18 U.S.C. § 922(a)(1)(A), reads in pertinent part:

> (a) It shall be unlawful —
>
> (1) for any person —
>
> (A) except a licensed importer, licensed manufacturer, or licensed dealer, to engage in the business of importing, manufacturing, or dealing in firearms, or in the course of such business to ship, transport or receive any firearm in interstate or foreign commerce. . . .

The definitions section, 18 U.S.C. § 921, provides in pertinent part:

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[1] Beecham concedes that no issue was raised below regarding the sufficiency of the evidence on the § 922(a)(1)(A) convictions, yet he contends that "the issue . . . was properly before the District Court." Cross-appellant's brief at 14. We have read the portions of the record cited by Beecham in support of this contention and are unable to discover any indication that this argument was raised below. In view of such a waiver, we will normally overturn the judgment of conviction only upon a finding of "manifest injustice." *See United States v. Stevens*, 817 F.2d 254, 255 n.1 (4th Cir. 1987). The government, however has fully briefed the sufficiency issue, and we choose to rest our decision on this basis.

> (a) As used in this chapter —
>
> (11) The term "dealer" means
>
> (A) any person engaged in the business of selling firearms at wholesale or retail,
>
> * * * *
>
> (21) The term "engaged in the business" means —
>
> (C) as applied to a dealer in firearms, as defined in section 921(a)(11)(A), a person who devotes time, attention and labor to dealing in firearms as a regular course of trade or business with the principal objective of livelihood and profit through the repetitive purchase and resale of firearms, but shall not include a person who makes occasional sales, exchanges or purchases of firearms for the enhancement of a personal collection or for a hobby, or who sells all or part of his personal collection of firearms.
>
> * * * *
>
> (22) The term "with the principal objective of livelihood and profit" means that the intent underlying the sale or disposition of firearms is predominantly one of obtaining livelihood and pecuniary gain, as opposed to other intents, such as improving or liquidating a personal firearms collection . . .

Beecham maintains that his firearms dealings were sporadic at most and that they did not rise to the level of "engaged in the business of selling firearms . . . ." He fails to recognize that a sufficiency of evidence argument must proceed from the standpoint of viewing all the evidence in the light most favorable to the government and of giving the government the benefit of all reasonable inferences. Viewed thusly, the evidence is sufficient.

The government need not prove that a defendant's "primary business was dealing in firearms or that he necessarily made a profit from it." *United States v. Masters*, 622 F.2d 83, 88 (4th Cir. 1980). The government must show "a willingness to deal, a profit motive, and a greater degree of activity than occasional sales by a hobbyist." *United States v. Huffman*, 518 F.2d 80, 81 (4th Cir.), *cert. denied*, 423 U.S. 864 (1975). It is sufficient that the evidence supports an inference that dealing in firearms was a regular business to which the defendant devoted time and effort and from which he intended to obtain a profit. A brief review of the evidence demonstrates that Beecham's firearm-related activity was more than a hobby.

Lucas witnessed the defendant involved in about five cash transactions for guns. Barbour, a formerly licensed gun dealer, had been asked to appraise "quite a few" firearms for Beecham. Beecham himself told agent McAleer that he bought "a lot of guns." A former salesman at the dealership told McAleer that Beecham could get "a lot more guns," and he testified that "a lot of guns moved through [the dealership]." Beecham told Barbour that he always sold the firearms "for more than what they were worth." Notwithstanding Beecham's efforts to minimize the extent of his dealings, the evidence and the allowable inferences therefrom clearly supports the verdict.

IV

In the government's appeal (92-5147), the judgment of the district court is reversed. In Beecham's appeal (92-5399), the judgment of conviction on counts 2, 6, 8, 9 and 10 is affirmed, and the sentence on these counts is vacated in order to allow the district court to determine the proper guideline sentence. The case is remanded with instructions to (1) reinstate the verdict and enter judgment of conviction on counts 1, 3, 4, 5, 7, and 11, and (2) resentence on all counts.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

APPENDIX B

UNITED STATES of America,
Plaintiff-Appellant,

v.

Kirby Lee JONES, Defendant-Appellee.

No. 92-5820.

United States Court of Appeals,
Fourth Circuit.

Argued April 2, 1993.

Decided May 24, 1993.

Amended by Order Filed July 9, 1993.

Indictment charging defendant with being felon in possession of a firearm and making false statements in connection with purchase of firearm was dismissed by the United States District Court for the Northern District of West Virginia, Robert Earl Maxwell, Chief Judge, and government appealed. The Court of Appeals, K.K. Hall, Circuit Judge, held that state's postconviction restoration of rights scheme cannot eliminate prior federal conviction as prior conviction for federal offense as being a felon in possession of a firearm.

Reversed and remanded with directions.

David J. Horne, Sr. Atty., Office of the Asst. Chief Counsel, Bureau of Alcohol, Tobacco & Firearms, Cincinnati, OH, argued (William A. Kolibash, U.S. Atty., and Lisa A. Grimes, Asst. U.S. Atty., Wheeling, WV, on brief), for appellant.

R. Russell Stobbs, Weston, WV, argued for appellee.

Before HALL and LUTTIG, Circuit Judges, and HILTON, United States District Judge for the Eastern District of Virginia, sitting by designation.

OPINION

K.K. HALL, Circuit Judge:

The United States appeals an order dismissing an indictment against Kirby Lee Jones. The indictment charged Jones with two counts of violating federal firearms laws. We reverse.

I

On March 3, 1992, Jones was indicted in the Northern District of West Virginia on one count of being an ex-felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1), and one count of making a false statement in connection with the purchase of a firearm, in violation of 18 U.S.C. § 922 (a)(6) and 924 (a)(1)(B). The indictment alleged that Jones had previously been convicted of the following felonies: (1) breaking and entering in 1969; (2) interstate transportation of a stolen motor vehicle in 1971; and (3) forgery in 1978. The stolen car conviction occurred in the United States District Court for the Southern District

of Ohio. The other convictions were in the state courts of West Virginia.

The government concedes that the state convictions cannot serve as predicate felonies under 18 U.S.C. § 921(a)(20) because West Virginia restored Jones' civil rights upon the completion of the forgery sentence in 1982. *See United States v. Haynes*, 961 F.2d 50 (4th Cir. 1992). The government contended, however, that the federal conviction remained a viable predicate conviction under the federal firearms act. The magistrate judge [1] recommended adoption of the position of the Eighth and Ninth Circuits that a state's restoration of rights scheme has the effect of eliminating even a prior federal conviction as a predicate conviction under § 922(g)(1). [2] The district court adopted the recommendation and dismissed the indictment. The government appeals.

II

It is a federal offense for some ex-felons to possess firearms: "It shall be unlawful for any person . . . who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year . . . to . . .

---

[1] The defendant's motion to dismiss the indictment was referred to the magistrate judge for a report and recommendation pursuant to 28 U.S.C. § 636(b)(1)(B) and Fed.R.Civ.P. 72(b).

[2] Count 2 of the indictment alleged that Jones falsely stated on the ATF forms that he was not prohibited by the federal firearms laws from possessing a firearm. The magistrate judge discussed only the felon-in-possession count (§ 922(g)(1)), apparently on the assumption that the allegedly false statement was not false if Jones was not prohibited from possessing a firearm under § 922(g)(1). On appeal, the government does not argue that count 2 could stand alone.

possess in or affecting commerce, any firearm . . . ." 18 U.S.C. § 922(g)(1). What qualifies as a "crime punishable by imprisonment for a term exceeding one year," or "predicate conviction," however, is subject to a number of statutory exceptions. Two of these exceptions have existed since 1968: (1) any prior conviction based on a violation of laws regulating business practices (18 U.S.C. § 921(a)(20)(A)); and (2) any prior state conviction for an offense that is classified as a misdemeanor by the state (18 U.S.C. § 921(a)(20)(B)). [3] These relatively straightforward provisions have generated little caselaw. *See, e.g., United States v. Meldish*, 722 F.2d 26 (2d Cir. 1983), *cert. denied*, 465 U.S. 1101, 104 S.Ct. 1597, 80 L.Ed.2d 128 (1984) (holding that a prior conviction for falsifying a customs declaration is not an offense relating to business practices within the meaning of § 921(a)(20)(B)).

In 1986, the Firearm Owners' Protection Act [4] refined the definition of predicate conviction as follows:

> What constitutes a conviction of [a crime punishable by imprisonment for a term exceeding one year] shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or

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[3] Gun Control Act of 1968, Pub.L. 90-618, Title I, § 102, 82 Stat. 1214.

[4] Pub.L. 99-308, § 101(5), 100 Stat. 449.

> restoration of civil rights expressly provides that the person may not ship, possess, or receive firearms.

This final provision of § 921(a)(20) [hereinafter, the "amendment"], particularly the term "has had civil rights restored," has engendered a growing body of caselaw. This amendment is the focus of this case.

We have dealt with this amendment on a number of occasions, but always from the perspective of a predicate *state* conviction. *See, e.g., United States v. McLean* 904 F.2d 216 (4th Cir.), *cert. denied*, 498 U.S. 875, 111 S.Ct. 203, 112 L.Ed.2d 164 (1990). The purported predicate conviction in Jones' case, however is a 1979 conviction in the *federal* district court of Ohio. The Eighth and Ninth Circuits have recently held that a state's restoration of rights scheme can negate even a prior *federal* conviction for the purposes of 18 U.S.C. § 922(g)(1) and § 921(a)(20). *United States v. Geyler*, 932 F.2d 1330 (9th Cir. 1991); *United States v. Edwards*, 946 F.2d 1347 (8th Cir. 1991). Our interpretation of the statute leads us to the opposite conclusion.

III

In view of the circuit-split that will be created by our judgment, perhaps our first task should be to explain why we reject the analyses and holdings of our sister circuits. For clarity's sake, inasmuch as both *Geyler* and *Edwards* come to the same conclusion by the same route, we will limit our discussion to the earlier-decided and more extensive opinion of the Ninth Circuit.

The linchpin of *Geyler* [5] (although it is not acknowledged as such) is that the second sentence of the amendment should be considered apart from the first -- "[t]he two sentences . . . pertain to two entirely different sets of circumstances." *Geyler*, 932 F.2d at 1334-35. In support of this segregation, the court characterizes the first sentence as merely setting forth the seemingly unremarkable proposition that "federal law determines the existence of a federal conviction, and state law determines the existence of a state conviction." *Id.* at 1334. Contrary to the "wishful suggestion" of the government, the court described the second sentence as an "unrelated reference" to the effect of post-conviction events. *Id.* at 1334-35. [6]

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[5] At its most fundamental level *Geyler* rests on the interpretation of Arizona law. The court stated that "upon [Geyler's] discharge from imprisonment [on the federal sentence], . . . Arizona granted him an automatic restoration of civil rights." *Geyler*, 932 F.2d at 1331 and n. 1. This statement is based on an Arizona restoration-of-rights statute that does not mention federal convictions, but which the court interprets to include federal convictions in order to avoid an anomalous result.

In Jones' case, the district court held, based on our decision in *United States v. Haynes*, 961 F.2d 50 (4th Cir. 1992), that West Virginia law, as evidenced by the 'certificate of discharge' received by Jones, restored his civil rights. Jones, of course, received nothing from the State of West Virginia upon completion of his federal sentence. Instead of examining West Virginia law to determine whether the state's restoration scheme was intended to cover federal felons, we choose to rest our decision on the federal statute alone.

[6] After noting that the first sentence "quite simply" says that the prosecuting jurisdiction determines what a conviction is (952 F.2d at 1335), the court added the following footnote:

> The [first] sentence was enacted "to accommodate state reforms adopted since 1969, which permit dismissal of charges after a plea and successful completion of a probationary period, or

Having reduced the scope of its inquiry to a single sentence, the court purports to find that the term at issue — "any conviction . . . for which a person . . . has had civil rights restored . . . ." — is decipherable through examination of the plain meaning of the words alone. The analysis proceeds along the following lines: (1) although both the states and the federal government provide for pardons, expungements and setting aside convictions, only states provide procedures for restoring civil rights to persons who have completed felony sentences; (2) "Congress could not have expected that the federal government would perform this [restoration] function . . . ."; (3) Congress could have limited the benefits of rights restoration to state felons only; (4) the second sentence refers to "any conviction;" (5) therefore, the reference to the restoration of civil rights must be to the state procedure.

This analysis does not strike us as one based solely on plain meaning. The first departure from a plain meaning analysis is the court's assumption that the Congress "was certainly aware" of the lack of a federal restoration procedure. "Restoration of civil rights" is, at the very least, a term that can admit of several legitimate interpretations. It is, for example, at least arguable that the federal procedure embodied in 18 U.S.C. § 925(c) is a rights-restoration scheme; indeed, it is the ultimate restoration for firearm

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which create "open-ended" offenses, conviction for which may be treated as misdemeanor or felony at the option of the court. *Federal Firearms Owners Protection Act*, S.Rep. No. 583, 98th Cong., 2d sess. 7 (1984).

Id. at n. 7. This is hardly support for the proposition that the two sentences are unrelated. The cited material refers directly to the post-conviction procedures outlined in the second sentence of the amendment.

purposes. [7] Another possibility is that the term applies only to situations in which "some state *action* granted a convicted felon a specific pardon, expungement or restoration of rights, such as a Restoration of Civil Rights Certificate . . ." *(United States v. Hammonds*, 786 F.Supp. 650, 662 (E.D.Mich. 1992) (emphasis in original)), rather than restorations by operation of law. *See also United States v. Ramos*, 961 F.2d 1003, 1008 (1st Cir. 1992) (interpreting restoration of rights to require "some affirmative step after conviction."). In any event, as soon as the court in *Geyler* strayed outside the text of the statute to assume congressional knowledge on a subject that is outside the ken of most persons, the plain meaning analysis was compromised.

In a footnote, the *Geyler* court concedes that there are *some* civil rights lost by virtue of a federal felony conviction that "presumably the state cannot restore." *Id.* at 1334 n. 6. What the court does not say is that these civil rights could presumably be restored by the federal government; that the federal government did not have in place a restoration procedure in 1986 does not preclude the possibility that one would be established sometime thereafter.

The upshot of all this is that the Ninth Circuit's "plain language" interpretation of the amendment misses the forest for the trees. "[I]n expounding a statute, we [are] not . . . guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *Massachusetts v. Morash*, 490 U.S. 107, 109 S.Ct. 1668, 104 L.Ed.2d 98 (1989) (internal citation omitted) (quoted in *Geyler*, 932 F.2d at 1337 (Fletcher, J.

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[7] This section establishes a procedure by which the Secretary of the Treasury may provide "relief from the disabilities imposed by federal laws with respect to the . . . possession of firearms . . . ."

dissenting)). Once it is determined that the words of the amendment itself do not readily admit of a single interpretation, we must place it in some larger context.

IV

"Statutes, including penal enactments are not inert exercises in literary composition. They are instruments of government, and in construing them the general purpose is a more important aid to the meaning than any rule which grammar or formal logic may lay down." *United States v. Shirey*, 359 U.S. 255, 260-61, 79 S.Ct. 746, 749, 3 L.Ed.2d 789 (1959) (internal quotation omitted). Subsection 921(a)(20) has a single purpose — to define a term used elsewhere in the Act, *i.e.* "a crime punishable by imprisonment for a term exceeding one year." As a definitional provision, the amendment has meaning only in reference to the overall act in which the definition is used.

The Gun Control Act of 1968 [8] was a response "to widespread national concern that existing Federal control over the sale and shipment of firearms [across] State lines is grossly inadequate." H.Rep. No. 1577 (June 21, 1968). As a general proposition, then, the legislative goal was to exert greater federal control over the spread of firearms. One of the means of accomplishing this was to prohibit ex-felons from possessing or dealing in firearms. Initially, all former felons were to be covered by the prohibition except those covered by subsections (a)(20)(A) and (B).

The primary impetus for the amendment under discussion was Congress's intent to reverse the ruling of the

[8] The Gun Control Act was enacted as Title IV of the Omnibus Crime Control and Safe Street Act of 1968.

Supreme Court in *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 103 S.Ct. 986, 74 L.Ed.2d 845 (1983). *See United States v. Geyler*, 932 F.2d 1330, 1335 (9th Cir. 1991); *id.* at 1336-37 (Fletcher, J. dissenting). *Dickerson* involved a prior state prosecution of one Kennison for carrying a concealed firearm. State law allowed the court to place Kennison on probation while deferring entry of judgment of conviction. Upon Kennison's successful completion of the probationary period, the record of the deferred judgment was expunged. Kennison later applied for a firearm dealer's license from the Bureau of Alcohol, Tobacco and Firearms. On the license application, he answered that he had never been convicted of a felony. The license was issued but later revoked on the ground that the state conviction triggered the federal firearm disabilities. [9] The Supreme Court upheld the revocation. In reaching this result, the Court held that the issue of what constituted a "conviction" under the federal firearms statutes was a question of federal, not state, law. *Id.* at 111-12, 103 S.Ct. at 991.

In the Senate report accompanying a bill containing essentially the same provisions as the current version of § 921(a)(20), [10] the committee noted that "[s]ince the Federal prohibition is keyed to the state's conviction, state law should govern in these matters." S.R. 98-583 (98th

[9] In addition to prohibiting ex-felons from possessing firearms, § 922(g) and (h) prohibit the same class of ex-felons from dealing in firearms without a license from the Secretary of the Treasury. *See* 18 U.S.C. § 923(d)(1)(b) (1982).

[10] S.Rept. No. 98-583 (98th Congress) accompanied S. 914, which contained substantially the same language regarding the exclusion from the definition of conviction now found in § 921(a)(20).

Congress). The report also noted that the bill would override the *Dickerson* decision where state courts or legislatures had decided not to treat certain guilty pleas as convictions. *Id.* at n. 16. In other words, a state would determine the lingering effects of a conviction in its own courts. The purpose of the statute remains unchanged — to keep guns out of the wrong hands.

Given this background, it is difficult to imagine any conclusion other than the one we reach in this case. By enacting the amendment, Congress clearly wished to endow each state with the power to determine how convictions by that state would be treated. If a state determines that one of *its* offenders should not be stigmatized in any manner, then the amendment allows the state to return such an offender to his pre-conviction status. But "a preference exists for determining the meaning of federal criminal legislation without reliance on diverse state laws [and] . . . in the absence of a specific indication to incorporate the differing rules of the states, federal criminal sanctions should be applied with uniform standards and definitions." *United States v. Lender*, 985 F.2d 151, 157 (4th Cir. 1993) (interpreting the first sentence of the amendment). *See also NLRB v. Randolph Electric Membership Corp.*, 343 F.2d 60, 62-63 (4th Cir. 1965) ("In the absence of a plain indication to the contrary, . . . it will be assumed when Congress enacts a statute that it does not intend to make its application dependent on state law."). We believe that a far greater degree of specificity would be necessary before we would be willing to find a statutory intent to allow the individual states to negate federal convictions.

V

Under the holdings in *Geyler* and *Edwards*, the confusion engendered by the federal statute would increase exponentially. The possibility of a "civil rights bath" is alluded to in *Edwards*. *See* 946 F.2d at 1350. One only has to pursue this concept a short distance before the problems become evident. For example, A and B are released from federal prison after serving sentences for identical crimes. Each was prosecuted in the same district court in a state that does not restore civil rights to its own felons. A remains in the state in which he was prosecuted. After a while, he goes to visit B, who was then living in a state that does restore civil rights. Together they commit an armed robbery in B's new home state and are prosecuted in the federal court there for, among other offenses, violations of § 922(g)(1). Under *Geyler*'s holding, B could not be prosecuted for the firearm offense, whereas A could. A similar result would arguably obtain if B had only temporarily moved to the restoring state (long enough to get his "bath") and then committed the robbery in A's state. Such possibilities militate further against the interpretation adopted in *Geyler*.

VI

As an alternative basis for its holding, the court in *Geyler* asserts that the rule of lenity requires the result reached in that case because the reference in the second sentence to "any conviction" renders the amendment ambiguous "at the least." *Id.* at 1336; *see also Edwards*, 946 F.2d at 1350. The rule of lenity applies only where the ambiguity remains after resort to the legislative history fails to disclose the intent of the drafters. *See United States v. McDonald*, 692 F.2d 376, 379 (5th Cir. 1982), *cert. denied*, 460 U.S. 1073, 103 S.Ct. 1531, 75 L.Ed.2d 952 (1983). As

discussed above, we find no ambiguity. The legislative history leads to only one conclusion — that Congress intended for a state's post-conviction restoration scheme to affect only the rights of persons convicted in that state's courts.

The order dismissing the indictment is reversed, and the case is remanded with directions to reinstate the indictment.

REVERSED AND REMANDED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
June 29, 1993

No. 92-5147
CR-91-84-5

UNITED STATES OF AMERICA
Plaintiff - Appellant

v.

LENARD RAY BEECHAM
Defendant - Appellee

On Petition for Rehearing with Suggestion
for Rehearing In Banc

The appellee's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,
/s/ Bert M. Montague
Clerk

APPENDIX D

Supreme Court of the United States

No. A-141

Kirby Lee Jones,

Petitioner

v.

United States

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including September 21, 1993.

/s/ William R. Rehnquist
Chief Justice of the United States

Dated this 13th
day of August, 1993

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF WEST VIRGINIA

UNITED STATES OF AMERICA

v.

KIRBY LEE JONES,
Defendant.

CRIMINAL ACTION
NO. 92-00046
FILED OCT. 21, 1992
U.S. DISTRICT COURT
ELKINS, WV 26241

PROPOSED FINDINGS OF FACT
AND RECOMMENDATION FOR DISPOSITION

The defendant in this criminal action has filed a Motion to Dismiss Indictment. The Honorable Robert E. Maxwell, United States Chief District Judge, referred this dispositive motion to the undersigned United States Magistrate Judge for a recommendation for disposition. 28 U.S.C. § 636(b)(1)(B); Fed.R.Civ.P. 72(b); Local Court Rule 4.01(d). For the reasons expressed below, I recommend that the defendant's motion be granted.

The defendant is charged in a two count indictment with possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1), and with knowingly making a false statement in connection with the acquisition of a firearm in violation of 18 U.S.C. § 922(a)(6). The Indictment relies upon three felony convictions: a 1969 West Virginia conviction for Breaking and Entering, a 1971 federal conviction for Interstate Transportation of a Stolen

Automobile, and a 1978 West Virginia conviction for Forgery.

The defendant argues that the Indictment should be dismissed because none of these convictions constitute a conviction within the meaning of 18 U.S.C. § 921(a)(20). That section provides:

> What constitutes a conviction for such a crime shall be determined in accordance with the laws of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside, or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

In this case, on May 21, 1982, the defendant received a document from the West Virginia Department of Corrections, entitled Official Certificate of Discharge, which certifies that Jones, "is hereby discharged from parole and any or all civil rights heretofore forfeited are restored."

In *United States v. Haynes*, 961 F.2d 50 (4th Cir. 1992), the Fourth Circuit held that such a restoration precludes prosecution under 18 U.S.C. § 922(g)(1) because it does not expressly limit the right of the felon to possess a firearm as required by § 921(a)(20). Further, the court held that such a prosecution is barred for felons receiving a certificate before July 7, 1991, even though on that date

W.Va. Code § 61-7-7 criminalized possession of a firearm by a former felon.

In this case, therefore, "the Government concedes that based on *Haynes*, the two West Virginia convictions" cannot form the basis for a § 922(g)(1) prosecution. The Government argues, however, that the *state* Certificate of Discharge does not affect the validity of the defendant's 1971 *federal* conviction.

The two circuits which have addressed the issue directly reject the Government's position. [1] In *United States v. Geyler*, 932 F.2d 1330 (9th Cir. 1991), the defendant was convicted of a federal felony. As a result, his civil rights in his home state of Arizona were revoked. Upon discharge from imprisonment, Arizona law granted him an automatic restoration of his civil rights.

The Ninth Circuit held that such restoration precluded use of the federal felony. The court acknowledged that an expungement, pardon or setting aside of a conviction nullifies the conviction itself and may only be performed by the jurisdiction of conviction. It held, however, that restoration of civil rights is not so restricted. In support of this conclusion, the court reasoned first that Congress could not have expected the federal government to perform this function, because "there is no federal procedure for restoring federal rights to a federal felon." *Id.* at 1333. Further, "the overwhelming majority of civil disabilities imposed upon the conviction of a felony whether the conviction is state or

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[1] The Sixth Circuit would apparently follow the Eighth and Ninth Circuits. In an unpublished opinion, *United States v. Kaplan*, 972 F.2d 349 (6th Cir. 1992), the court expressly reserved the issue but favorably discussed *Edwards* and *Geyler* at considerable length.

federal are imposed by state law. *Id.* at 1334 n.6. Thus, the Arizona restoration prevented use of the defendant's federal conviction.

The Eighth Circuit reached the same result in *United States v. Edwards*, 946 F.2d 1347 (8th Cir. 1991). The defendant in that case also had a prior federal felony conviction and his home state of Minnesota statutorily restored his civil rights automatically upon completion of his sentence. The court held that the plain language of the second sentence of § 921(a)(20) "any conviction" is not limited by the first sentence. Although the court held that the statute was unambiguous and therefore resort to legislative history was unnecessary, it noted:

> [The legislative history] shows that the last two sentences of § 921(a)(20) articulate two ideas, addressing two different problems . . . [T]he first sentence in question has to do with the effect of state convictions and the later sentence has to do with the effect of state pardons, restorations of civil rights and expunctions.

Id. at 1349 (citing S.Rep. No. 583, 98th Cong., 2d Sess. 7 (1984) and S.Rep. No. 953 at 7).

In short, "it is the state, not the federal government, that defines and restores a person's civil rights, even in relationship to the federal government." *Id.* at 1350 n. 5 (*quoting* the decision below in *United States v. Edwards*, 745 F.Supp. 1477, 1479 (D.Minn. 1990)).

The Eighth Circuit also rejected the argument that the Government makes here; that 18 U.S.C. § 925(c) is the sole

means by which a federal felon can regain the right to possess a firearm:

> [O]n its face the federal firearms statute sets out two different routes to restoration of firearms privileges. The government has shown no reason why §§ 921(a)(20) and 925 cannot both exist as alternative routes for lifting firearms disabilities.

Id. at 1350.

Especially in the absence of any comparable authority, I am persuaded that *Geyler* and *Edwards* were correctly decided. To the extent that one sentence in *United States v. Essick*, 935 F.2d 28 (4th Cir. 1991) would suggest a contrary result, it is dictum. Accordingly, I recommend that the defendant's motion be granted, and the Indictment in this case be dismissed.

Any party may, within ten (10) days after being served with a copy of this Recommendation for Disposition, file with the Clerk of the Court written objections identifying the portions of the Proposed Findings of Fact and Recommendation for Disposition to which objection is made, and the basis for such objection. A copy of such objections should also be submitted to the Honorable Robert E. Maxwell, United States Chief District Judge. Failure to timely file objections to the Proposed Findings of Fact and Recommendation for Disposition set forth above will result in waiver of the right to appeal from a judgment of this Court based upon such proposed findings and recommendation. 28 U.S.C. § 636(b)(1); *United States v. Schronce*, 727 F.2d 91 (4th Cir. 1984), *cert. denied*, 467

U.S. 1208 (1984); *Wright v. Collins*, 766 F.2d 841 (4th Cir. 1985); *Thomas v. Arn*, 474 U.S. 140 (1985).

The Clerk of the Court is directed to mail an authenticated copy of these Proposed Findings of Fact and Recommendation for Disposition to counsel of record.

Respectfully submitted this 21st day of October, 1992.

/s/ United States Magistrate Judge

APPENDIX F

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. HOWARD JAY KAPLAN, Defendant-Appellant.

No. 91-2003

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

1992 U.S. App. LEXIS 17378

July 17, 1992, Filed

NOTICE:

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. SIXTH CIRCUIT RULE 24 LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE RULE 24 BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

SUBSEQUENT HISTORY: Reported as Table Case at 972 F.2d 349, 1992 U.S. App. LEXIS 26146.

PRIOR HISTORY: United States District Court for the Eastern District of Michigan. District No. 90-80843. Taylar, District Judge.

JUDGES: BEFORE: GUY and BOGGS, Circuit Judges; and RONEY, Senior Circuit Judge of the United States Court of Appeals for the Eleventh Circuit, sitting by designation.

OPINION BY: PER CURIAM

OPINION: PER CURIAM. Howard Kaplan appeals his convictions for being a felon in possession of a firearm and for making false statements in connection with the acquisition of firearms. He also appeals the district court's sentencing decision. For the reasons given below, we affirm both of Kaplan's convictions. However, we reverse the district court's sentencing decision and remand this case for a recalculation of Kaplan's sentence.

I

On March 1, 1991, Kaplan waived his right to be charged by grand jury indictment. On the same day, the government filed a two-count information, charging Kaplan with being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g) (Count I), and with making a false statement in connection with firearm acquisitions, in violation of 18 U.S.C. § 922(a)(6) (Count II). Kaplan entered a plea of guilty to both counts on March 20, 1991.

Prior to sentencing, Kaplan filed objections to the proposed calculation of his sentence under the guidelines. Specifically, Kaplan objected to the probation department's legal conclusion that the special offense characteristic reduction for possession of firearms for collection and sporting purposes, as authorized by U.S.S.G. § 2K2.1(b)(1), could never apply to a defendant convicted of being a felon in possession of a firearm. Kaplan contended that he was entitled to a sentence reduction because he possessed firearms

as a collector and for the purposes of competitive sport shooting. On August 26, 1991, the United States District Court sentenced Kaplan to 27 months' imprisonment on each count, to run concurrently. The court also imposed a three-year term of supervised release and a $3,000 fine. The court refused to apply the sport/collection adjustment, stating that to find the adjustment applicable to a conviction under the felon in possession statute would "set the law on its ear." Additionally, the court found that target shooting at a gun range as practice for competitive matches did not qualify as a "lawful sporting purpose" and that Kaplan had not possessed the weapons solely for collection purposes.

This conviction arose from the investigation of a burglary at Kaplan's home. After he found that his house had been burglarized, Kaplan notified police. When police arrived, they noted that Kaplan had numerous firearms displayed on the wall of a small, locked room in his home. The local authorities notified the Bureau of Alcohol, Tobacco, and Firearms (ATF). The ATF investigation revealed that Kaplan had prior felony convictions, the most recent of which had occurred in 1981. Using this information, the ATF obtained a warrant and searched Kaplan's home on May 10, 1990. During the search, the government photographed Kaplan's collection of weapons and memorabilia and seized numerous firearms from the secured room in his house. Those eighteen firearms, and the statements Kaplan made to acquire some of them, provided the basis for the information in this case.

The underlying conviction that served as the basis for the felon-in-possession charge in the information was another felon-in-possession conviction that occurred in federal court in Arizona in 1981. Thus, the predicate felony conviction here was another federal crime. Kaplan maintains that

because his civil rights had been restored, the information charging him with being a felon in possession of a firearm in this case failed to allege a chargeable offense and, therefore, his conviction on Count I must be reversed. Kaplan also contends that since his civil rights had been restored and he had the right to possess firearms, Count II of the information, charging him with making false statements in the acquisition of firearms, also failed to allege a federal crime. He therefore urges this court to reverse his conviction on Count II. Finally, Kaplan challenges the district court's sentencing decision. Kaplan argues that the district court erred when it refused to apply the sport/collection adjustment to a felon-in-possession conviction and, further, when it refused to classify Kaplan's guns as part of collection and used exclusively for sporting purposes. We address each of these issues in turn.

II

The Felon-in-Possession Conviction

The main issue in this case centers on the felon-in-possession statute, 18 U.S.C. § 922(g). Section 922(g) provides, in pertinent part:

> (g) It shall be unlawful for any person —
>
> (1) who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year to ship or transport in interstate or foreign commerce, or to possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped in interstate or foreign commerce.

The definition of a conviction for a "crime punishable by imprisonment for a term exceeding one year" is found at 18 U.S.C. § 921(a)(20):

> What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which had been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

So, if a defendant's civil rights have been restored, and his ability to possess firearms has not been expressly curtailed, then the felony may not be used as the predicate for a federal felon in possession charge.

This Circuit has recently been presented with issues under the felon-in-possession statute in *United States v. Driscoll*, No. 91-1583 (6th Cir. July 16, 1992) and *United States v. Gilliam*, 778 F.Supp. 935 (E.D. Mich. 1991), appeal argued, March 23, 1992 (No. 91-2417). Both of those cases, however, involved state convictions as predicate acts for the felon-in-possession charges. The issue in both Driscoll and Gilliam was whether the state of Michigan had sufficiently restored the civil rights of the defendants such that their respective Michigan convictions could not serve as predicates for the federal felon-in-possession charges in a federal court in Michigan.

The issue in this case is different because the predicate act for the felon-in-possession conviction was a federal felon-in-possession conviction in a different state from the one in which the defendant was arrested. Since we are dealing with a conviction of a federal crime instead of a crime in certain state, the analysis of whether the defendant's civil rights have been restored becomes more complicated. We must determine where to look to answer the pivotal restoration of rights question. First, we must determine whether we should look to federal law or to the law of a particular state. Second, if we should look to state law, then the question becomes which state's law we should apply.

Kaplan's main argument is that the civil rights that he lost as a result of his 1981 conviction on felon in possession charges in a federal court in Arizona had since been restored by Michigan, his state of citizenship. He contends that since his civil rights had been restored for this conviction, then, according to 18 U.S.C. § 921(a)(20), the 1981 conviction could not serve as a predicate for the felon-in-possession charges in this case. Kaplan acknowledges that he can only prevail if state rather than federal law governs the restoration of rights issue, and, further, only if the law of his current state of citizenship, Michigan, rather than the law of the state where he was convicted of the predicate offense, Arizona, applies. Finally, the court must also find that Michigan law, if it applies, actually restored Kaplan's civil rights and did not restrict his right to own firearms. In sum, the only way we can overturn Kaplan's felon-in-possession conviction is if we find that Michigan law applies and restores Kaplan's civil rights without restricting his right to own firearms.

A. The Felon-in-Possession Statute

Until 1986, federal law proscribed the possession, shipment, transportation, and receipt of all firearms or ammunition by anyone who had been convicted "in any court" of a "crime punishable by imprisonment for a term exceeding one year." 18 U.S.C. §§ 922(g)(1) & (h)(1) (1982) (emphasis added). In *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 111-20 (1983), the Supreme Court held that states had no power to exempt their citizens from the federal firearm ban by restoring the civil rights of felons or expunging their convictions. Congress responded to Dickerson by enacting the Firearm Owners Protection Act, Pub. L. No. 99-308, 100 Stat. 449 (1986), which modified federal firearms law effective November 15, 1986. The Firearm Owners Protection Act changed the law by empowering each state to exempt some or all of its convicted felons from the federal firearm ban.

This court has interpreted § 921(a)(20), the statutory language at issue in this case, on several occasions. Under § 921(a)(20), Congress empowered a state to shield its felons from future conviction for "felon in possession." According to § 921(a)(20):

> What constitutes a conviction for such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which had been expunged, or set aside or for which a person has been pardoned or had his civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms. (Emphasis added).

In this case, as in most, we are not dealing with a predicate conviction that has been pardoned, expunged, or set aside. We must, therefore, engage in a two-step analysis. First, we must determine if Kaplan has had his civil rights restored with regard to the predicate conviction. If his civil rights have been restored, then his conviction cannot serve as the predicate for a felon-in-possession charge unless the state expressly restricted his right to possess firearms.

Our jurisprudence sets up a test for determining if a defendant's civil rights have been restored. State weapons restrictions on felons are not a factor in the first step of the civil rights restoration analysis. However, under the second step, such restrictions can nullify the effect of the civil rights restoration and restore the federal government's ability to use the particular offense as a predicate for a felon-in-possession prosecution. In other words, the purpose of the amendment of the federal felon-in-possession statute was to return to the states the decision of whether or not to allow their felons to carry weapons. If the state restores civil rights, and does not restrict weapons possession, then that state's felons will not be subject to prosecution under the federal felon-in-possession statute.

The main Sixth Circuit cases interpreting § 921(a)(20) are *United States v. Cassidy*, 899 F.2d 543 (6th Cir. 1990) and *United States v. Breckenridge*, 899 F.2d 540 (6th Cir. 1990). In *Cassidy*, 899 F.2d at 546, this court held:

> Considering the definition as a whole, it is clear that Congress intended the courts to refer to state law to determine whether an individual should be subject to federal firearms disabilities by virtue of a criminal conviction. If state law has restored civil rights to a felon, without expressly limiting the felon's firearms

> privileges, the felon is not subject to federal firearms disabilities. This is the clear and unambiguous intent of Congress as expressed in section 921(a)(20).

So, a court must look at the whole of the law in the jurisdiction where the proceeding took place to determine whether the conviction falls within the statutory definition necessary to serve as a predicate conviction for a felon-in-possession charge. We have also held that in determining whether a state has restored the civil rights of a felon, we must look to the whole of state law to see if the state has restored the right to vote, to serve on a jury, and to hold public office. *Id.* at 549. If these rights have been restored, then the state has "restored civil rights" for purposes of § 921(a)(20). If civil rights have been restored in this way, then courts must look to the whole of state law to determine if the state entitles felons "to exercise the privileges of shipping, transporting, possessing or receiving a firearm." *Ibid.*

B. A Federal Felony as the Predicate for a Federal Felon in Possession Conviction

As stated, this case is unique because it involves a federal crime as the predicate offense for Kaplan's conviction. This presents two questions. First, do we now apply state law or federal law to determine if the Kaplan's civil rights have been restored? Second, if state law applies, then which state's law? There have been no Sixth Circuit cases directly on point. Two other circuits, however, have addressed the first question.

A panel of the Ninth Circuit, including Judge Lively of this Circuit sitting by designation, partially addressed this issue in *United States v. Geyler*, 932 F.2d 1330 (9th Cir.

1991). In *Geyler*, the defendant was convicted in federal court in Arizona of the federal felony of misprison of a felony. Geyler received an absolute discharge from imprisonment after serving his sentence and Arizona law granted him an automatic restoration of civil rights. Geyler was later caught holding firearms at his house in Arizona and was convicted by a federal court in Arizona of a violation of the federal felon-in-possession law. The Ninth Circuit held that the inquiry as to whether Geyler's civil rights had been restored was governed by state law, even when the predicate felony was a federal crime.

In *Geyler*, the government relied on the first sentence of § 921(a)(20), which refers to the law of the prosecuting jurisdiction, and argued that only action taken by the federal government, and not by the states, could nullify the effect of a prior federal felony conviction. The Ninth Circuit rejected this contention. The court began by noting that under § 921(a)(20), a conviction cannot serve as a predicate offense if [it] has been expunged or set aside or pardoned or if civil rights have been restored. When a conviction is nullified, set aside, or pardoned, the conviction itself is nullified. However, when civil rights are restored, the sole objective is to restore rights and the conviction itself is not affected. According to the *Geyler* court, 932F.2d at 1332:

> The specific reference in § 921(a)(20) to the restoration procedure indicates that Congress intended to recognize that independent process as a separate basis for treating a conviction as a non-conviction. Moreover, the inclusion in the statute of the restoration procedure could not have been accidental. The procedure is widely used, and Congress was certainly aware of it.

The court then pointed out that both state and federal law contain procedures for the first three procedures set out in the statute: expungement, setting aside of a conviction, and pardon. However, the court found no established federal procedure for the restoration of civil rights. The court held as follows:

> The restoration of civil rights, however, is an entirely different matter. State law deprives felons, both state and federal, of their civil rights initially . . . . And only the states provide a procedure whereby following completion of a felon's sentence his conviction remains intact but his civil rights may be restored. Unlike any of the other procedures listed in § 921(a)(20), a state's restoration of civil rights is available to all felons.
>
> Because there is no federal procedure for restoring civil rights to a federal felon, Congress could not have expected that the federal government would perform this function. The reference in § 921(a)(20) to the restoration of civil rights must be to the state procedure.

Id. at 1333. The court also held that if Congress had meant to limit the benefits of a state's restoration of rights to state felons only, then it would have expressly done so in the statutory language. Instead, § 921(a)(20) provides that "any conviction . . . for which a person . . . has had civil rights restored shall not be considered a conviction for purposes of this chapter." So, the court held that according to the plain language of the statute, "a federal felon whose civil rights are restored pursuant to state law, like a state's felon whose rights are so restored, is no longer considered as having been 'convicted' for purposes of the federal firearms laws" *Id.*

The court's discussion of the government's argument, based on the first sentence of the definitional provision of § 921(a)(20), informs the next issue, the choice of which state's law applies. As stated above, in *Geyler* the government argued under the first sentence that what constitutes a conviction for purposes of the felon-in-possession statute "shall be determined in accordance with the law of the jurisdiction in which the proceedings were held." The government contended that this also applied to the next sentence and, therefore, civil rights lost through federal crimes could only be restored by the federal government. In rejecting this contention, the court held that the second sentence was separate from the first because it deals with an entirely different set of circumstances:

> The two sentences relied on by the government pertain to two entirely different sets of circumstances. The first sentence addresses the question of what constitutes a conviction; this is, quite simply, answered by the law of the prosecuting jurisdiction, and Congress made it plain that it desired that result. The second sentence governs the effect of post-conviction events. Under the provisions of the second sentence, once the law of the prosecuting jurisdiction has confirmed that a conviction exists, there are four ways in which the effects of the conviction may be avoided for purposes of the federal firearms laws . . . As we have explained, the jurisdictional reach of federal and state law is not the same with respect to each of these procedures. Specifically, the restoration of rights, unlike the other procedures, is carried out only by the states, and it is the only procedure under which one jurisdiction may grant relief to persons convicted in the other.

Id. at 1335. This statement has implications for our choice-of-law principle. If we apply state law, the next question we face is whether to apply the law of the state where the conviction occurred or the state of the defendant's citizenship. The first sentence of the definitional section of § 921(a)(20) would seemingly support applying the law of the state of conviction. However, Geyler suggests otherwise.

The Eighth Circuit, in *United States v. Edwards*, 946 F.2d 1347 (8th Cir. 1991), agreed with the *Geyler* court. More importantly, perhaps, the *Edwards* court adopted the same characterization of the independence of the two sentences in § 921(a)(20). In *Edwards*, 946 F.2d at 1350, the court also stated:

> The government argues that a ruling in Edward's favor would permit felons from around the nation to regain their firearms privileges by going to Minnesota long enough to take a "civil rights bath." If this is so, it is Congress and the Minnesota legislature, not this court, that have drawn the water.

This again suggests that the state of citizenship, and not the state where the convicting federal court was located, provides the relevant state law for the restoration of civil rights determination. In fact, the district court in *Edwards* expressly stated that court should apply the law of the state where the felon is a citizen, and this language was quoted by the Ninth Circuit in *Geyler*:

> While the law of the jurisdiction where the proceeding is held determines what is a conviction and whether it has been set aside, expunged, or subject to a pardon, the law of the state where a person is a citizen governs that person's civil rights.

Geyler, 932 F.2d at 1334 (quoting *United States v. Edwards*, 745 F.Supp. 1477, 1479 (D. Minn. 1990)).

C. Choice of Law

In its brief in this case, the government does not concede that state and not federal law applies in the restoration of rights determination. The government, however, does not really argue the point, but merely contends that application of the appropriate state law in this case will not alter the outcome. The government contends that since Kaplan was convicted of the predicate felony in federal court in Arizona, Arizona law governs the restoration decision. In Arizona, the civil rights of anyone who is convicted of a felony are automatically suspended. However, those rights are restored for first-time offenders "upon completion of the term of probation, or upon absolute discharge from imprisonment." Ariz. Rev. Stat. Ann. § 13-912(a). However, Kaplan was a multiple offender, so the following Arizona restoration statute applies:

> Upon proper application, a person who has been convicted of two or more felonies who has received an absolute discharge from imprisonment in a federal prison may have any civil rights which were lost or suspended by his conviction restored by the presiding judge of the superior court in the county in which he now resides.

Ariz. Rev. Stat. Ann. § 13-910(A). The government contends that since Kaplan did not file the required application, his civil rights were never restored in Arizona.

Further, the government argues that even if Kaplan is treated as a first-time offender, that restoration statute does

not apply to a felon's ability to own guns. A change in the statute made in 1988 requires a special application to be made to the court for a felon to have his gun rights restored. Since Kaplan did not make this application in Arizona, says the government, his right to possess weapons was restricted entirely.

Kaplan concedes that he loses this issue if Arizona law governs, but argues that Michigan law applies to this case because he is a citizen of Michigan. He relies on the holdings in *Geyler* and *Edwards* and urges this court to adopt similar reasoning. Kaplan contends that the first sentence of the statutory language is independent of the second sentence and urges that the state of citizenship is the state that can restore the rights of its convicted felons, even if those felonies arose in federal court in another state. However, the direct application of the relevant language of *Geyler* and *Edwards* to this case is problematic. Neither case involved a choice between states, but addressed only the issue of state versus federal law, since the state of the predicate conviction was identical to the state of citizenship of the defendants in those cases. While this issue was not directly before those courts, the language in the opinions certainly indicates that the law of the state of citizenship applies to the restoration determination. On the other hand, in both *Breckenridge*, 899 F.2d at 542, and *Cassidy*, 899 F.2d at 549, we stated that we must look to the whole of the state law "of the state of conviction" to determine whether the convicted felon is entitled to vote, serve on a jury, hold public office, and possess firearms. However, this issue was not directly before either of those panels of the Sixth Circuit, so any statements made addressing it could be fairly classified as dicta. The resolution of this choice of law question, then, seemingly turns on what precedential value is due to the relevant statements in *Breckenridge* and *Cassidy*.

D. Michigan Law

The resolution of this case is made substantially less difficult by the fact that Kaplan admits that he can only prevail if Michigan law applies. He argues that Michigan has restored his civil rights. However, assuming, without deciding, that Michigan law applies, Kaplan still cannot successfully argue for the reversal of his felon in possession conviction in this case. In the recent opinion in *Driscoll*, a panel of this Circuit held that Michigan has not restored the civil rights of its felons for purposes of the federal felon-in-possession statute. *Driscoll*, slip op. at 12. In doing so, the *Driscoll* court expressly rejected the contrary conclusion reached by the Ninth Circuit in *United States v. Dahms*, 938 F.2d 131 (9th Cir. 1991). *Driscoll*, slip op. at 2.

It is clear that, in Michigan, Kaplan's rights to vote and run for public office have been restored. The only question, then, is whether his right to serve on a jury has also been restored. Once a felon's sentence is complete, there is no statute prohibiting that individual from sitting on a jury. There are however, court rules in Michigan that allow counsel, or a court *sua sponte*, to exclude felons from the jury through challenges for cause. In *Driscoll*, we held that those rules meant that a felon did not have the right to sit on a jury in Michigan and, therefore, that Michigan had not restored the civil rights of felons for purposes of § 921(a)(20). *Id.* at 12. [1]

[1] Since Michigan has not restored Kaplan's civil rights, we need not proceed to the second step of the statutory analysis, the issue of whether Michigan has restricted Kaplan's right to possess firearms. In any event, the Michigan provision in effect at the time of Kaplan's plea and sentencing only restricted the possession of pistols for people who had been convicted of or incarcerated due to a felony "in the past eight years." Mich. Comp. Laws Ann. §§ 28.422(1) & (3)(c). Kaplan was released from custody in December 1981, so the eight-year period expired for Kaplan in 1989. This Michigan law was changed two days after Kaplan was sentenced, so the eight-year limit still applies in this case. It seems, then, that Michigan had not placed restrictions on Kaplan's ability to own a gun. None of this is relevant, however, since Michigan had not restored Kaplan's civil rights.

To summarize, if either federal law or Arizona law applies to the restoration-of-rights issue in this case, Kaplan admits that he loses his appeal. Neither the federal government nor the state of Arizona has restored Kaplan's civil rights. In addition, even if Michigan law applies, Kaplan cannot prevail. So, even under Kaplan's best-case scenario in which Michigan law applies to the restoration-of-rights question, we would affirm his conviction under the felon-in-possession statute. Therefore, we need not decide any of the choice-of-law questions presented in this case to affirm Kaplan's conviction. We do not decide whether federal or state law would apply to the restoration of rights question in a case such as this. Nor do we announce any choice-of-law principle for deciding which state's law applies, if any. We merely affirm Kaplan's conviction, which is required under any possible resolution of these issues. Under the "rule of parsimony," then, we leave these questions for another day. We will resolve them when the facts of a particular case presented to us compels their resolution.

III

The False Statement Conviction

Count II of the information alleged that on several occasions between July 18, 1988 and May 3, 1989, Kaplan represented that he had not been convicted of any crime punishable by imprisonment for a term exceeding one year. The government alleges that he did so on Bureau of Alcohol, Tobacco, and Firearms Forms 4473, which gun purchasers are required to fill out. Section 922(a)(6) of Title 18 makes it unlawful for a person to make a false statement in relation to a gun purchase. Under the statute, the government must prove that the defendant knowingly made false or fictitious statements intended or likely to deceive the firearms dealers with respect to any fact material to the lawfulness of the sale.

Question 8b of the Form 4473 is the relevant question in this case. Prior to amendment, question 8b asked:

> Have you been convicted in any court of a crime punishable by imprisonment for a term exceeding one year? (Note: The actual sentence given by the judge does not matter — a yes answer is necessary if the judge could have given a sentence of more than year. Also, a yes answer is required if a conviction has been discharged, set aside, or dismissed pursuant to an expungement or rehabilitation statute . . . .)

The question was later amended to reflect the 1986 change in § 921(a)(20), and stated that a yes answer was not required if the conviction had been expunged, set aside, or pardoned, or if civil rights had been restored. Kaplan contends that since the charged offenses in count II all occurred well after 1986, he is not guilty of making a false statement because his

civil rights had been restored by Michigan. He says that his "no" answer to question 8b was no longer false after the 1986 change in the law.

However, since Kaplan's civil rights were not in fact restored, even by the state of Michigan, his statements to the contrary on either the original or amended ATF forms were clearly false. We therefore affirm Kaplan's conviction for making false statements in connection with the acquisition of firearms, in violation of 18 U.S.C. § 922(a)(6).

IV

The Sentencing Issue

In sentencing Kaplan, the district court held that the offense level reduction in cases where the defendant possessed all ammunition and firearms solely for lawful sporting purposes or a part of a collection (U.S.S.G. § 2K2.1(b)(2)) could not apply to a conviction for being a felon in possession of a firearm. We review this issue of law de novo. The government concedes that the district court erred in concluding that this reduction could not apply as a matter of law to the case at bar. The case law supports this concession. *United States v. Wilson*, 878 F.2d 921, 924 (6th Cir. 1989). However, the government claims that the district court also made a factual finding that it would be inappropriate to grant this adjustment under the facts of this case and that this factual finding must be affirmed unless clearly erroneous.

Kaplan argues that the findings of the court were not "factual" at all but were based on legal misperceptions. The court stated that shooting the gun at ranges in preparation for competitive shooting matches is not a lawful sporting

purpose. Further, the court found that the firearms did not constitute a collection for purposes of the adjustment because the display included weapons and memorabilia that were not for sporting purposes. Kaplan contends that these are fundamentally errant legal determinations of the definitions of the guidelines terms of "sport" and "collection" and, therefore, are subject to de novo review. Kaplan maintains that the district court's narrow definitions of those words were wrong and that his collection of weapons and his use of those weapons for sport entitle him to the adjustment.

U.S.S.G. § 2K2.1(b)(2) provides:

> (2) If the defendant . . . possessed all ammunition and firearms solely for lawful sporting purposes or collection, and did not unlawfully discharge or otherwise unlawfully use such firearms or ammunition, decrease the offense level determined above to level 6.

According to Application Note 10 to this guideline, whether the defendant possessed the firearms and ammunition solely for "lawful sporting purposes and collection" is determined by the relevant surrounding circumstances including the number and type of firearms, the amount and type of ammunition, the location and circumstances of possession and actual use, the nature of the defendant's criminal history, and the extent to which possession was restricted by local law.

The district court in this case found that target shooting at gun ranges in preparation for shooting matches is not a lawful sporting purpose. Further, the court found that it was not a "collection" because the display of firearms included memorabilia and other weapons. These are not

technically factual findings, but constitute a mistaken application of a legal rule, which we review de novo.

Kaplan had a large collection of firearms, which he displayed on the walls of a locked room in his home. The collection contained other law enforcement and paramilitary memorabilia. None of the weapons were loaded and no other weapons were found anywhere else in Kaplan's home. We disagree with the district court that the fact that the guns were displayed with other memorabilia indicates that they do not qualify as a "collection" for purposes of this adjustment. On the contrary, the various posters, patches and other various weapons support Kaplan's contention that he maintained these weapons as part of a collection.

Further, the district court's finding that practicing at a gun range in preparation for competitive shooting matches did not constitute a "lawful sporting purpose" was also an erroneous application of § 2K2.1(b)(2). If this gun range activity was indeed practice for a lawful sport-shooting purpose, it too constitutes a lawful sporting purpose.

We therefore reverse the district court's decision refusing, as a matter of law, to apply § 2K2.1(b)(2) to felon-in-possession cases. In addition, we reject the district court's proffered reasons for refusing to apply the reduction to these facts, as those reasons are simply mistaken legal interpretations of the applicable guideline. We remand this case to the district court, so that it may reconsider the question whether the sport/collection reduction applies to the facts of this case in light of the correct legal standard explicated herein. If the district court chooses to deny the reduction in this case, it must do so for reasons other than those that we have found illegitimate.

V

In sum, we AFFIRM Kaplan's convictions for being a felon in possession of a firearm and for making false statements in connection with the acquisition of firearms. Further, we REVERSE the district court's refusal to apply the sport/collection adjustment to this case. We therefore REMAND this case to the district court for a reconsideration of Kaplan's sentence. The district court is ordered to render a decision on the application of the sport/collection adjustment based on the facts of this case and consistent with this opinion.